IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 05-CV-0329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S SUR-REPLY BRIEF IN RESPONSE TO DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL

Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter "the State"), pursuant to the Court's April 15, 2008 Order (Dkt. #1681), respectfully submits its Sur-Reply Brief in Response to Defendants' Reply in Support of Motion to Compel (Dkt. #1672):

I. THE COURT SHOULD NOT CONSIDER MATTERS RAISED FOR THE FIRST TIME IN A REPLY BRIEF

In their reply brief, Defendants raise, for the first time, a request for attorney fees as a sanction for the State's allegedly deficient production of data. Importantly, Defendants also raise several new factually specific allegations concerning the State's productions of March 25 and April 3, 2008.[1] Defendants' Reply, Dkt. #1672, at 2–9. Defendants point to these new allegations in support of the argument that "Plaintiffs' [sic] own production proves that they have substantially violated both Rule 37 and this Court's January 5, 2007 Order." *Id.* at 7.

[1] In their reply brief, Defendants mistakenly refer to the production of April 4, 2008, but the materials were actually produced on April 3, 2008.

This Court's Local Civil Rules provide that reply briefs are to address "new matter in the response brief." LCvR7.2(h). Local Rule 7.2(h) is not an open invitation to use a reply brief to raise new substantive grounds for relief or to seek additional relief. Yet, this is precisely what Defendants have done here.

Defendants cannot use a reply brief to expand the scope of their Motion to Compel. *See, e.g., Valenzuela v. Smith,* 2006 WL 403842, *2 (E.D. Cal. February 16, 2006) ("Plaintiff may not amend or expand the scope of his motion to compel by raising new issues in reply to opposition."); *Peacock v. Merrill,* 2008 WL 176375, *7 (S.D. Ala. January 17, 2008). Defendants' new request for attorney fees and new arguments with respect to the March 25 and April 3 productions can, and should, be rejected on this ground alone.

II. DEFENDANTS' FAILURE TO ATTEMPT IN GOOD FAITH TO OBTAIN THE REQUESTED DISCOVERY WITHOUT COURT ACTION IS FATAL TO ITS MOTION TO COMPEL AND REQUEST FOR ATTORNEY FEES

Even if the Court decides to consider Defendants' new request for fees and new arguments, the Motion to Compel and request for fees should be denied. For starters, Defendants blatantly disregarded the informal conference requirements of Fed.R.Civ.P. 37 and LCvR 37.1. Rather than simply picking up the phone and asking counsel for the State if the production was up-to-date, Defendants made no mention of the production issue for months; and, in true "sneak attack" fashion, filed the Motion to Compel without any forewarning or informal discussion. Then, even after the State's massive productions of March 25 and April 3, Defendants raised additional arguments and a new request for attorney fees – all without conferring with counsel for the State. All of the present issues could have been informally resolved without the Court's involvement. For instance, had Defendants complied with the Rules before filing their reply, they would have learned they already had much of the data produced in electronic format on

March 25, 2008. Aff. of Todd Burgesser, Ex. 1, at ¶¶6-9. Instead, Defendants chose to play a public game of "gotcha" for what appears to be some purely strategic purpose.

There are several informal conference requirements which are important here. First, Fed.R.Civ.P. 37(a)(1) provides that: "[t]he motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Second, LCvR 37.1 provides that: "this Court shall refuse to hear any [discovery dispute] motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord" (emphasis added). Third, Fed.R.Civ.P. 37(a)(5)(A) provides that when discovery is produced after a motion to compel is filed: ". . . the court must not order th[e] payment [of attorney fees] if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action . . ." (Emphasis added.) Defendants here failed to meet these informal conference requirements. As such, these Rules mandate denial of the Motion to Compel and the new request for fees.

In their Motion to Compel, Defendants reference a string of correspondence between counsel regarding the production of various data and documents, culminating in a December 19, 2007 letter from Louis Bullock (for the State) to Robert George (for the Tyson Defendants). Motion to Compel, Dkt. #1605, at 4–7. Notably, nowhere in the December 19, 2007 letter did the State refuse to produce any of the requested data. Ltr. from L. Bullock to R. George, 12/19/07, Ex. 2. In fact, the December 19, 2007 letter was part of the State's continuing good faith attempt answer to Defendants' alleged concerns and to resolve any lingering discovery disputes:

- "I believe you have all of the QA/QC documents, but if you could specify which you believe you are missing, I will attempt to run them to ground."
- "NO DATA is being withheld nor will any be withheld as the result of [the QA/QC] process, and no results have been or will be changed as a result of this internal QA/QC procedure."
- "The census data is publicly available data. . . . That issue aside, you will receive this data as part of the information relied upon or considered by Dr. Fisher."
- ". . . I am open to discussing a possible exchange of [GPS correlation] charts . . . Let me know if such a discussion might bear fruit."
- ". . . [W]e have produced the data as it has become available resulting in the Defendants receiving it in pieces rather than in one completed package. This has resulted in your receiving it in much the same manner as the Plaintiff has received it."

Id. at 1–3. Mr. Bullock ended the December 19, 2007 letter by stating, "I trust this letter is fully responsive to your requests." *Id.* at 3. However, Defendants never replied to the December 19, 2007 letter and never sought to meet and confer with Mr. Bullock with respect to any issue addressed in the letter.

The December 19, 2007 letter conclusively shows the parties had not reached an impasse on any discovery dispute at issue and that informal communications were ongoing. Thus, Defendants' mere summation of the correspondence exchange in their Motion to Compel cannot satisfy the certification requirements of Fed.R.Civ.P. 37(a)(1) and LCvR 37.1. Defendants made no effort after December 19, 2007 to meet and confer or otherwise informally resolve any remaining disputes. Defendants chose to say nothing, lay behind the log for over 60 days, and file their Motion to Compel without the slightest warning. Such conduct is the very antithesis of above-cited informal conference requirements. Defendants' manifest failure to comply with the informal conference requirements mandates that this Court deny the Motion to Compel and the belated request for fees. *See, e.g., Gouin v. Gouin*, 230 F.R.D. 246, 247 (D.Mass. 2005); *Payless Shoesource Worldwide, Inc. v. Target Corp.*, 237 F.R.D. 666, 670–71 (D.Kan. 2006).

III. IN THE ALTERNATIVE, DEFENDANTS' NEW REQUEST FOR ATTORNEY FEES SHOULD BE DENIED AS THE STATE WAS "SUBSTANTIALLY JUSTIFIED" IN PRODUCING DATA AFTER THE MOTION TO COMPEL WAS FILED AND BECAUSE THE OVERALL CIRCUMSTANCES RENDER AN AWARD OF FEES UNJUST

Even if the Court should decide that Defendants' new arguments and request for fees survive under Fed.R.Civ.P. 37(a)(5)(A)(i) and LCvR7.2(h), the request for fees should still be denied. Under Fed.R.Civ.P. 37(a)(5)(A)(ii) and (iii), when discovery is produced after a motion to compel is filed: ". . . the court must not order th[e] payment [of attorney fees] if . . . the opposing party's nondisclosure, response, or objection was substantially justified; or . . .other circumstances make an award of expenses unjust." (Emphasis added.) Here, the State was more than "substantially justified" in producing data and other items on March 25 and April 3, 2008, after the Motion to Compel had been filed. Further, the overall circumstances (*e.g.*, Defendants' failure to meet and confer, the State's good faith and diligent efforts) render an award of fees unjust.

There are some overarching circumstances which make an award of fees unjust. First, this is not the typical discovery dispute where one party has flatly refused to produce requested materials. Here, the State has produced all of the data required by the Court's January 5, 2007 Order, and has made substantial and good faith efforts to update the productions as fully and quickly as practicable. There is nothing to compel, and the Motion to Compel and reply are moot;[2] this weighs against an award of fees. Second, the Court should consider the sheer volume

[2] In their reply brief, Defendants note that as of March 25, 2008, the State admittedly had yet to produce additional USGS data, chain of custody forms and photographs. Reply at 8. The remaining chain of custody forms and photographs were produced on April 3, and Defendants do not allege otherwise. *See* ltr. from L. Bullock to M. Bond, 4/3/08, Ex. 3. Aside from the fact that the USGS data is publicly available on the USGS website, that data was produced to Defendants via email on March 25, 2008. *See* email from L. Bullock to M. Bond,

of data the State has produced to date. As set forth in the Response to Defendants' Motion to Compel, the State's production of scientific data (and related items) has been a massive and complex effort. Defendants do not dispute this. Under such conditions, it should be expected that some data may not always be produced as quickly as Defendants would like; isolated good faith delays do not warrant an award of fees. The Court should also consider Defendants' failure to resolve the subject disputes outside of Court. *See, supra.* Lastly, the Court's January 5, 2007 Order did not place any time limitations on the production of new or supplemental data. The State cannot be sanctioned for any failure to comply with *Defendants'* arbitrary time constraints for supplemental production.

Furthermore, Defendants' specific complaints raised in the reply brief are either completely without merit or easily explained. In their reply brief, Defendants raise several new specific arguments assailing the State's March 25, 2008 production. Defendants also attached an affidavit and table to the reply brief in an effort to show alleged widespread deficiencies in the March 25 production. Dkt. #1672-2. Following are the State's responses to the specific complaints raised in the reply brief and affidavit.

A. Camp, Dresser and McKee ("CDM") Data

1. February 2008 Data

Though unspecified and unsubstantiated, Defendants apparently take issue with data from February 2008 which was produced on March 25, 2008. Dkt. #1672-2, Ex. A, at 3 and 5 (STOK35489–35504; STOK0049301–49329). The February 2008 data was produced within a realistic timeframe and was clearly in compliance with the Court's January 5, 2007 Order. Aff. of Todd Burgesser, Ex. 1 at ¶5.

3/25/08, Ex. 4. Consequently, there is truly no substantive complaint to be resolved in the Motion to Compel or the reply brief.

2. Electronic Data

Defendants mistakenly believe the State did not produce a large quantity of data, generated in 2006 and 2007, until March 25, 2008. *See* Reply at 5–6; Dkt. #1672-2, Ex. A, at 5–7. Most of the 2006 and 2007 data produced on March 25 was merely the electronic format of data previously produced in hard copy format. Aff. of Todd Burgesser, Ex. 1 at ¶6. The State's environmental consultant, CDM, recently received 2006 and 2007 data in electronic format from the A&L Laboratory, which was then produced to Defendants on March 25. *Id.* But Defendants received most of this 2006 and 2007 data in hard copy report format long ago. *Id.*

For instance, Defendants allege the State "withheld," for two years, 15 samples taken and analyzed in March 2006 and another 50 samples taken and analyzed in August 2006. Defendants' Reply at 6. On the contrary, *all* of this 2006 data was originally produced to Defendants in hard copy format on February 1, 2007 and April 1, 2007. Aff. of Todd Burgesser, Ex. 1 at ¶7. Defendants will find this data on CDs 1, 2 and 8. *Id.* Also contrary to Defendants' assertions, this data was validated through the QA/QC process. *Id.*

Additionally, Defendants complain the State failed to produce 500 samples, taken in April and May 2007, until March 25, 2008. Defendants' Reply at 6. All of this April and May 2007 data was previously produced in hard copy report format during the summer and fall of 2007. Aff. of Todd Burgesser, Ex. 1 at ¶8. Defendants will find this data on CDs 11, 14 and 20. *Id.* All of this data was validated through the QA/QC process. *Id.*

Defendants assert the State failed to produce additional samples, taken in June and July 2007, until March 25, 2008. Defendants' Reply at 6; Dkt. #1672-2, Ex. A, at 5–6. But this data, too, was previously produced in hard copy format as part of the State's November 19 and

December 28, 2007 productions. Aff. of Todd Burgesser, Ex. 1 at ¶9. Defendants will find this data on CDs 20 and 21. *Id.*[3]

The electronic data issue is a prime example of how Defendants have wasted the time and resources of the Court and the State. This matter could have been easily resolved outside of Court, had Defendants made any effort before filing the reply brief with their new and unfounded allegations of misconduct.

3. January 2008 Data

Defendants list data that was taken and/or analyzed in January 2008 and produced on March 25, 2008. Dkt. #1672-2, Ex. A, at 2–3 (STOK35472–35491). Defendants' complaint about the production of this data is unclear.

Any delay in the production of the January 2008 data was due to a change in the way the lab submitted reports. Aff. of Todd Burgesser, Ex. 1 at ¶12. Before January 2008, the lab had submitted the reports via the mail. However, without notification to those tasked with facilitating production of the data, the January 2008 data was simply uploaded to the CDM website. *Id.* Once it was discovered that the data was on the website, Todd Burgesser of CDM began efforts to make the reports available to the State for production. *Id.* The March 25, 2008 production of the January 2008 data does not violate the January 5, 2007 Order and was substantially justified.

4. December 2007 Data

Defendants additionally complain that data from December 2007 was not produced until March 25, 2008. The production of the December 2007 data on March 25, 2008 does not violate

[3] Data from the August 2007 sampling was not produced until March 25, 2008. However, QA/QC validation of this August 2007 sampling was not completed until February 18, 2008. Aff. of Todd Burgesser, Ex. 1 at ¶10. Therefore, this August 2007 data was produced within a realistic timeframe. *Id.*

the Court's January 5, 2007 Order and certainly is not sanctionable conduct. Some of the December 2007 data was simply overlooked during the holiday season. Aff. of Todd Burgesser, Ex. 1 at ¶13. The data was produced as soon as CDM realized the production was still pending. *Id.* Some chemical data from December 2007 was delayed due to a delay from the lab in providing QA/QC information for chloride and nitrate. *Id.*

5. Diatom Count, Macroalgae and Macroinvertebrate Samples

Defendants also complain that the March 25, 2008 production included diatom count samples taken from September 2006 through May 2007, 500 macroalgae samples taken March–May 2007, and 80 benthic macroinvertebrate samples taken in April and June 2007. Reply at 6.

Approximately one-half of this macroalgae and macroinvertebrate data was previously produced. Aff. of Todd Burgesser, Ex. 1 at ¶15. Delay in production of the remaining data was an oversight. *Id.* CDM erroneously believed that this data had been previously produced; but after receiving a hard drive of Bates-numbered pages, CDM noticed that the diatom and some of the macroalgae and macroinvertebrate data was not included. *Id.* There was never any intention of not producing this data; it was simply a case of data being temporarily overlooked in the midst of the approximately 100,000 pages that were produced. *Id.*

Delay in producing this data was not part of some grand conspiracy to withhold information from Defendants. It was the type of simple mistake that happens from time-to-time in such large, document-intensive cases. In light of all the surrounding circumstances, the production on March 25, 2008 was substantially justified, and it would be unjust to award fees.

B. Lithochimeia Documents

Defendants also complain the State has only now produced field books dated as early as 2006. Defendants' Reply at 4. First, these field books obviously are not scientific testing data

and far different than the "data" which was the focus of the Motion to Compel. In any event, the field books at issue were generated in 2006 by Rashida Coulthurst when she was still a college student. Ms. Coulthurst has since graduated from college and is now employed by Lithochimeia, a consulting firm retained by the State. As soon as Ms. Coulthurst brought these field books to the attention of counsel for the State, they were produced. It is truly absurd for Defendants to suggest the State would deliberately withhold or conceal these rather inconsequential field books. They were produced in an abundance of caution as part of the State's continuing and comprehensive effort to assure that everything that should be produced, has been produced.

Defendants also believe certain notes from April and May 2007 should have been produced earlier. Defendants' Reply at 4. As with the field books, these notes were produced as part of the State's effort to update and supplement its production. Production of these notes on March 25, 2008 does not violate the Court's January 5, 2007 Order.

Lastly, Lithochimeia discovered a small stack of synoptic river field sheets during the recent effort to update the production. During the initial production, Lithochimeia produced an immense amount of documents. The small stack of synoptic river sheets was inadvertently excluded from that initial production. Furthermore, these sheets were generated purely for the purpose of locating possible sampling sites. The synoptic river sheets do not contain substantial testing data which will be relied upon by the State.

WHEREFORE, premises considered, the State respectfully requests that the Court refuse to consider the new arguments raised by Defendants in their reply brief and deny the Motion to Compel and request for attorney fees accordingly.

Respectfully submitted,

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I certify that on the 28th day of April, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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